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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO._____

RAFAEL R. MARTINEZ, JR.,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, RAFAEL R. MARTINEZ, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the Petitioner's conviction of (1) conspirary to import and possess with intent to distribute a quantity of marihuana, in violation of 21 U.S.C. §§ 963 and 846, and (2) possession with intent to distribute a quantity of marihuana, in violation of 21 U.S.C. § 841(a)(1).

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, hereinafter cited "App.," *infra*, pp. 23-35) is not yet reported. The opinion of the Court of Appeals in *United States v. Simpson*, No. 73-1208 (5th Cir. June 29,1973) (App., *infra*, pp. 38-44) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 3, 1973 (App., *infra*, pp. 23-35). The order of the Court of Appeals denying Petitioner's Petition for Rehearing and Petition for Rehearing En Banc was

entered on August 14, 1973 (App., *infra*, pp. 36-37). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and Rules (19)(1)(b) and 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the search and seizure conducted by Federal customs authorities without a warrant and without probable cause six days and one hundred fifty miles from the Mexican border was an illegal search and seizure violative of the Fourth Amendment.
2. Whether the special parole provisions contained in 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 960(b)(2) of the Drug Abuse Prevention and Control Act are unconstitutional as violative of (1) the Fifth Amendment guarantee that no person shall be deprived of life, liberty, or property without due process of law, and (2) the Eight Amendment proscription against cruel and unusual punishment.
3. Whether Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq*, is unconstitutional as proscribing intrastate activities.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Eighth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . nor cruel and unusual punishments inflicted.

The pertinent part of 21 U.S.C. § 841(b)(1)(B) provides:

> In the cases of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than five years, a fine of not more than $15,000, or both *** Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least two years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least four years in addition to such term of imprisonment.

The pertinent part of 21 U.S.C. § 960(b)(2) provides:

> In the case of a violation under subsection (1) of this section with respect to a controlled substance other than a narcotic drug in Schedule I or II, the person committing such

violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is Schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in Schedule IV.

Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq*, is not reprinted herein due to space limitations.

STATEMENT OF THE CASE

On March 7, 1972, Petitioner, RAFAEL R. MARTINEZ, JR., was charged in a seven count indictment with conspiracy to import and to possess with intent to distribute a quantity of marihuana, importation of a quantity of marihuana, and possession with intent to distribute a quantity of marihuana (Appendix on appeal, hereinafter cited "R.," pp. 1, 7).

On April 14, 1972, count three of the indictment was dismissed (R. 6, 38) and on June 21, 1972, counts four and six of the indictment were dismissed (R. 9, 47). On June 27, 1972, Petitioner was tried before a jury, and on June 29, 1972, Petitioner was found guilty of counts one, two, and seven of the indictment (R. 10, 11). Subsequent to his conviction Petitioner filed his Motion for Judgment of Acquittal After Conviction (R. 12, 48, 56), and on July 21, 1972, Petitioner's Motion for Judgment of Acquittal was granted as to count two of the indictment, and overruled as to counts one and seven of the indictment (R. 13, 60, 272-305). On July 21, 1972, Petitioner

was sentenced on counts one and seven of the indictment: five years imprisonment on count one, with a ten year special parole term, and five years imprisonment on count seven, with a ten year special parole term, to run concurrently (R. 13).

The Petitioner appealed the judgment of the trial court to the United States Court of Appeals for the Fifth Circuit, and the Court of Appeals affirmed the judgment of the trial court on July 3, 1973 (App., *infra*, pp. 23-35). The Court of Appeals denied the Petitioner's Petition for Rehearing and Petition for Rehearing En Banc on August 14, 1973 (App., *infra*, pp. 36-37).

Briefly stated, the facts that gave rise to the questions presented by the Petitioner in his appeal and in this Petition are as follows:

On January 28, 1972, a 1969 International Truck entered the United States from the Republic of Mexico, crossing the border at the International Bridge at Laredo, Texas (R. 66, 449-454). After inspection of the truck at the bridge by federal agents, without finding any violation of law, the truck was permitted to enter the United States from the Republic of Mexico. After the passage of an indeterminable period of time, information was received from a computer monitoring system that the truck should be placed under surveillance (R. 169-179). The truck was discovered in the rear of Wagner's Cafe in Laredo, Texas, approximately thirty-five (35) minutes after crossing at the bridge (R. 66, 169-174, 450, 453-4, 465, 489) and approximately four (4) miles from the Mexican border (R. 78, 464, 496). Thereafter, from 1:20 p.m., January 28, 1972, until 9:50 a.m., February 3, 1972, the truck was under surveillance by federal agents (R. 66, 465,

489, 338, 72-73). During that six-day period, the truck was moved in excess of three hundred (300) miles travelling between Laredo, Texas, and San Antonio, Texas (R. 372-3). According to the testimony of the Government witnesses at the pre-trial hearings and at the trial on the merits, the truck was moved from Laredo, Texas, to Freer, Texas (R. 68, 457-8); from Freer, Texas, back to Laredo, Texas, where it was parked at the residence of Refugio Garza at 1301 Guadalupe Street (R. 75); from Guadalupe Street to Cabello Brothers Wrecking Yard in Laredo, Texas, where, for all practical purposes, it was under the control of federal agents (R. 74-76, 459-460, 466); from Cabello Brothers Wrecking Yard in Laredo, Texas, to Von Ormy, Texas (R. 75, 462); from Von Ormy, Texas, to San Antonio, Texas (R. 76, 328), and while in San Antonio, Texas, the truck was stopped by federal agents and a search was conducted (R. 185, 211, 216-17, 336-38). The truck in question was stopped and searched in San Antonio, Texas (1) without a search warrant, (2) one hundred fifty (150) miles from the international border, (3) approximately one hundred forty-two (142) hours after the crossing at the border, (4) after having travelled approximately three hundred (300) miles between several Texas cities after crossing the bridge at the international border, (5) with a thirty-five (35) minute break in the surveillance of the truck when it first crossed the international border, (6) after an Assistant United States Attorney had determined that no search warrant would be required, and (7) despite the fact that during the six (6)-day surveillance of the truck, whether it was moving or stationary, a United States Magistrate was readily available in order to secure a search war-

rant. At the trial on the merits the hearsay testimony of two co-conspirators, Hermilindo Garcia (indicted co-conspirator) and Benito Solis (unindicted co-conspirator), was admitted into evidence over the objections of the Petitioner (R. 525-557, 558-588). As was argued at the trial and in the Petitioner's Motion for Judgment of Acquittal After Conviction, the hearsay testimony of the two co-conspirators, conflicting as to their own knowledge of the conspiracy, was critically prejudicial to the Petitioner in that it was substantially the only evidence upon which the jury could have concluded that the Petitioner was guilty (R. 273-305).

The Petitioner sought to challenge in his appeal to the United States Court of Appeals for the Fifth Circuit, the validity of the search and seizure of the truck, the constitutionally of the special parole provisons of he Drug Abuse Prevention and Control Act under which he was sentenced, the admissioility of the declarations and activities of the two co-conspirators under the co-conspirator's exception to the hearsay rule, the sufficiency of the evidence to support the finding of guilt as to the conspiracy count, [21 U.S.C. §§ 963, 846], and the substantive count [21 U.S.C. § 841(a)(1)] of the indictment, and finally, the constitutionality of Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*

The Court of Appeals in affirming the judgment of the trial court, held in its opinion (App., *infra*, pp. 23-29, 29) that the warrantless search and seizure of the truck in question constituted a valid border search and that the customs agents had "reasonable suspicion to believe (*not* probable cause to believe) that the customs laws of the United States were being violated.

The Court of Appeals in its opinion (App., *infra*, p. 35) held that the Petitioner's constitutional challenge to the special parole provisions lacked merit, citing the Court of Appeals decision in *United States v. Simpson*, No. 73-1208 (Fifth Circuit, June 29, 1973) (App., *infra*, pp. 38-44). The Court of Appeals held in *Simpson, supra*, that the constitutional challenge to the special parole provisions presented in that appeal were not "ripe for adjudication," declining any definitive Fifth or Eighth Amendment analysis of the challenged special parole provisions of the Drug Abuse Prevention Control Act. In affirming the Petitioner's conviction, the Court of Appeals also held that the evidence was sufficient to support the finding of guilt as to both counts of the indictment, that the declarations of the two co-conspirators were admissible, and, citing its decision in *United States v. Lopez*, 459 F. 2d 949 (5th Cir. 1972), and the decision in *United States v. Scales*, 464 F. 2d 371 (6th Cir. 1972), that the constitutional attack on Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq*, lacked merit.

REASONS FOR GRANTING THE WRIT

Question Presented

Whether the search and seizure conducted by federal customs authorities without a warrant and without probable cause six days and one hundred fifty miles from the Mexican border, was an illegal search and seizure violative of the Fourth Amendment.

1. The Fifth Circuit Court of Appeals rendered a decision in conflict with the decisions of the Ninth Circuit Court of Appeals.

The holdng of the Court of Appeals below that the warrantless search and seizure in question constituted

a valid border search, constitutes a decision and constitutional test in conflict with the decisions and constitutional test of the Ninth Circuit Court of Appeals. See, in particular, Comment, *Border Searches: An Exception to Probable Cause,* 3 ST. MARY'S L. J. 87 (1970). See also, Comment, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers,* 5 N.Y.U. INT. L. & POL. 93 (1972). Note, *Border Search in the Ninth Circuit: Almeida-Sanchez, A Borderline Decision,* 23 HASTINGS L. J. 1309 (1972). Note, *Intrusive Border Searches — Is Judicial Control Desirable?,* 115 U. PENN. L. REV. 276 (1966). Beginning with the premise that warrantless searches are *per se* unreasonable, except for a few well-established exceptions, the Petitioner sought to challenge in his appeal the validity of the warrantless search and seizure that led to his conviction. The primary question presented to the Court of Appeals below for its determination was whether or not the search of the truck in question on February 3, 1972, in San Antonio, Texas, qualified as an extended border search, and thus, an exception to the probable cause requirement normally required in order for a search to be within the constitutional limits of the Fourth Amendment.

The Court of Appeals below held in its opinion (App., *infra,* pp. 23-29,29) that the warrantless search constituted a valid border search and that the customs agents had "reasonable suspicion to believe" (*not* probable cause to believe) that the customs laws had been violated. The truck in question was stopped and searched without a search warrant, one hundred fifty (150) miles from the international border, approximately one hundred forty-two (142) hours after

crossing the border, after having travelled approximately three hundred (300) miles between several Texas cities after crossing the bridge at the international border, with a thirty-five (35) minute break in the surveillance of the truck when it first crossed the international border, after an Assistant United States Attorney had determined and advised that no search warrant would be required, and despite the fact that during the six (6)-day surveillance of the truck, whether it was moving or stationary, a United States Magistrate was readily available in order to secure a search warrant. The Court below held in its opinion (App., *infra,* pp. 26-27), citing its recent decision in *United States v. Thompson,* 475 F. 2d 1359 (5th Cir. 1973), that,

> "'Border searches, absent search warrants or probable cause have been uniformly upheld by the Courts as long as the customs agents have had a reasonable suspicion of violations of the customs laws.' Although proximity to the border and the lapse of time since the crossing are proper factors for consideration, no specific temporal or spatial limitations on the authority to conduct a border search have been imposed either by statute or by judicial decisions. Thus, to reiterate, the appropriate constitutional test is a reasonableness standard, which requires a full evaluation of the circumstances leading to the search as a basis for determining its propriety."

The Petitioner respectfully submits that there is an apparent conflict between the Fifth and Ninth Circuits in their tests employed to determine the legality of an extended border search. That conflict, as noted by the Supreme Court in *Harris v. United States,* 400 U.S.

1211, 91 S. Ct. 4, 5, 27 L. Ed. 2d 30, 32 (1970), should be resolved by this Court. See, for example, and in particular, *Alexander v. United States*, 362 F. 2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U. S. 977, 87 S. Ct. 519, 17 L. Ed. 2d 439 (1966). *King v. United States*, 348 F. 2d 814 (9th Cir. 1965), *cert. denied*, 382 U. S. 926, 86 S. Ct. 314, 15 L. Ed. 2d 339 (1965). *United States v. Peterson*, 473 F. 2d 875 (9th Cir. 1973). *United States v. Majorau*, No. 72-2307 (9th Cir. February 16, 1973). *Thomas v. United States*, 372 F. 2d 252 (5th Cir. 1967). *Stassi v. United States*, 410 F. 2d 946 (5th Cir. 1969). *United States v. Caraway*, 474 F. 2d 25 (5th Cir. 1973). *United States v. Warner*, 441 F. 2d 821 (5th Cir. 1971). *Marsh v. United States*, 344 F. 2d 317 (5th Cir. 1965). *United States v. McDaniel*, 463 F. 2d 129 (5th Cir. 1972). *United States v. Thompson, supra. Garcia v. United States*, 452 F. 2d 419 (5th Cir. 1971).

This Court should grant a writ in this case in order to resolve the apparent conflict between the Fifth and Ninth Circuit tests employed to determine the legality of an extended border search. This Court should adopt a uniform test, whether it be a "totality of the surrounding circumstances," surveillance test as set out by the Ninth Circuit in the *King, supra,* and the *Alexander, supra,* decisions, or the "reasonableness" standard employed by the Fifth Circuit Court of Appeals in the instant case. Furthermore, and moreover, as noted below, this Court in the recent case of *Almeida-Sanchez v. United States*,_____ U. S._____, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (June 21, 1973), utilized a "functional equivalence" test in analyzing the legality of a purported border search.

In *United States v. Peterson, supra,* the Ninth Cir-

cuit focused on the fact that the customs agents had lost sight of the vehicle for a ten minute interval, even though noting that constant surveillance of the vehicle is not necessarily required. Also, in *United States v. Majorau,* supra, the Ninth Circuit held invalid the search of a vehicle searched three hours after its entry into the United States and ninety (90) miles from the border. Contrary to the decision of the Fifth Circuit Court of Appeals in *United States v. Thompson, supra,* and particularly after the decision of this Court in *Almeida-Sanchez, supra,* it is apparent that the status of the person conductng the search, or whether the search was conducted pursuant to statutory authority, or whether or not an automobile is involved are not necessarily conclusive factors in determining the validity of a purported border search.

2. The Fifth Circuit Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court interpreting the Fourth Amendment.

Secondly, and perhaps more importantly, the holding of the Court of Appeals below is squarely in conflict with the very recent decision of this Court in *Almeida-Sanchez v. United States,*_____U. S._____, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (June 21, 1973). In *Almeida-Sanchez, supra,* the United States Border Patrol conducted a warrantless search of an automobile twenty-five (25) miles north of the Mexican border. The search was made without probable cause and without the consent of the driver, and the search uncovered the marihuana upon which the driver was convicted of a federal crime. The Government sought to justify the search on the basis of 8 U.S.C. § 1357(a), which provides for warrantless searches of automobiles

"within a reasonable distance from any external boundary of the United States," and upon the Attorney General's regulation, 8 C.F.R. § 287.1, that defines a "reasonable distance" as "within one hundred (100) air miles from any external boundary of the United States." This Court in reversing the Ninth Circuit Court of Appeals decision upholding the search, held that the search of the automobile, made without probable cause or consent, violated the Fourth Amendment, and could not be justified on the basis of any statute or regulation, nor could it be justified under the automobile exception to the warrant requirement, nor, moreover, could it be justified as a border search or "the functional equivalent thereof." The Court stated,

> "Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be the functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search. But the search of the Petitioner's automobile by a roving patrol, on a California road that lies at all points at least twenty (20) miles north of the Mexican border, was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of "unreasonable searches and seizures."

(93 S. Ct., at 2535).

It is apparent under the functional equivalency analysis enunciated by this Court in *Almeida-Sanchez, supra,* that the search of the truck in the instant case cannot be upheld as a border search or as an extended border search, nor can it be justified or upheld under the automobile exception to the warrant requirement.

In the absence of the Court finding two conditions precedent to a search, namely (1) probable cause, and (2) exigent circumstances, the instant search cannot be upheld under the automobile excption to the warrant requirement enunciated by this Court in *Carroll v. United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). See also, *Chambers v. Maroney,* 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). In view of this Court's decision in *Coolideg v. New Hampshire,* 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), and the trend in the decisions of this Court in preferring the acquisition of search warrants, except for the well-defined and limited exceptions, the search and sizure in the case at bar clearly falls outside the confines of the Fourth Amendment. It can hardly be gainsaid that six (6) days is an ample time for law enforcement agents to obtain a search warrant. Indeed, under the proposed amendment to Rule 41 of the Federal Rules of Criminal Procedure a search warrant may be issued upon the sworn oral testimony of a person, merely by placing a telephone call. See Proposed Rule 41(c)(2), Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 476 F. 2d 29-32 (Supp. January, 1973). As this Court has previously written:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and

> use search warrants whenever reasonably practicable. *** This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities." *Trupiano v. United States,* 334 U. S., 699, 705, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), quoted with approval in *Chimel v. California,* 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

See also *Coolidge v. New Hampshire, supra.* Note, *Chambers v. Maroneys New Dimensions in the Law of Search and Seizure,* 46 INDIANA L. J. 257, 262 (1971). Comment, *The Supreme Court's Search for Fourth Amendment Standards,* 45 CONN. B.J. 2, 25 (1971). Given the obvious availability and practicability of a search warrant under the facts and circumstances herein, there is no justification for the failure to obtain a warrant to conduct the search of the truck in question. Furthermore, as noted by Mr. Justice Powell, in his concurring opinion in *Almeida-Sanchez v. United States, supra,*

> "The conclusion that there may be probable cause to conduct roving searches does not end the inquiry, for 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'
>
> * * *
>
> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.
>
> * * *
>
> More closely in point on their facts are the cases

involving automobile searches.

* * *

But while those cases allow automobiles to be searched without a warrant in certain circumstances, the principal rationale for this exception to the warrant clause is that under those circumstances 'it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' " (93 S. Ct., at 2543).

3. The Fifth Circuit Court of Appeals decided an important question of federal law which should be settled by this Court.

In all respects, the question of the validity of the search in this case is one which has obvious practical importance from the standpoint of the administration of criminal justice. The apparent conflict between the Ninth and Fifth Circuits as to the approach to be taken in analyzing border searches should be resolved by this Court. The apparent conflict between the Fifth Circuit and the recent decision of this Court in *Almeida-Sanchez*,_____U. S._____, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), should also be resolved. The question remaining after *Coolidge v. New Hampshire*, is whether the classification of border searches constitutes one of the "well-defined exceptions" to the warrant requirement. It is respectfully submitted that this Court should adopt a uniform or *per se* constitutional test for the validity of border searches and that such a test should encompass such factors as the distance of the search from the point where the contraband was alleged to have been introduced into the United States, the total mileage travelled, the time that elapsed since the crossing at the international border, and the scope

of the surveillance from the time of the crossing of the border. Again, in the words of Mr. Justice Powell, in his concurring opinion in *Almeda-Sanchez, supra,*

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.' 387 U. S., at 533, 87 S. Ct., at 1733.
>
> * * *
>
> It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement." (93 S. Ct., at 2544).

It is apparent that the obvious governmental objective in enforcing the customs laws, and in particular those dealing with the illegal importation of drugs, would not be frustrated by requiring the acquisition of a warrant under the facts and circumstances of this case. The history of the Fourth Amendment has always been that the means justifies the end, and not, contrary to the reasoning in the opinion of the Court of Appeals in the instant case, that the end justifies the means.

Question Presented

Whether the special parole provisions contained in 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 960 (b)(2) of the Drug Abuse Prevention and Control Act are unconstitutional as violative of (1) the Fifth Amendment guarantee that no person shall be deprived of life, liberty, or property with-

out due process of law, and (2) the Eighth Amendment proscription against cruel and unusual punishment.

1. The Fifth Circuit Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court interpreting the Fifth and Eighth Amendments.

The Petitioner herein also sought in his appeal to challenge the constitutionality of the special parole provisions contained in 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 960(b)(2) of the Drug Abuse Prevention and Control Act on the grounds that the special parole provisions (1) violate the proscription against cruel unusual punishment of the Eighth Amendment in that they provide for an arbitrary and oppresively excessive punishment, (2) violate the due process clause of the Fifth Amendment in that they are indefinite, uncertain, and vague, and (3) completely sabotage the basic purposes and fundamental concepts of a parole system. The Court of Appeals in its opinion (App., *infra*, p. 35) held that the Petitioner's constitutional challenge to the special parole provisions lacked merit, citing the Court's decision in *United States v. Simpson*, No. 73-1208 (5th Cir. June 29, 1973). The Court below held in *Simpson, supra*, (App., *infra*, pp. 38-44, 41), that the constitutional issues presented in the Petitioner's Appeal were not "ripe for adjudication." The Petitioner herein was sentenced on July 21, 1972, to two concurrent terms of five years imprisonment with a ten year special parole term. In failing to give any definitive expression on the constitutionality of the special parole provisions the Court of Appeals below, by avoidance, decided a federal question in a manner in conflict with applicable decisions of this Court

interpreting the Fifth and Eight Amendments of the Constitution.

The stautory scheme of enumerating a minimum period of parole without stating a maximum period violates the cruel and unusual punishment clause in that the sentence prescribed by the statute permits the sentencing court to impose a sentence that could restrain and restrict the defendant for a period for as long as the defendant's lifetime, when otherwise, the maximum sentence prescribed by the statute is incarceration for a period not in excess of five years. The special parole provisions authorize a punishment which is not commensurate to the offense and which carries a grossly more severe penalty that the statutory penalties for essentially similar offenses. *Weems v. United States,* 217 U. S. 349. 30 S. Ct. 544, 54 L. Ed. 793 (1909). *Furman v. Georgia,* 408 U. S. 238, 98 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Also, the special parole provisions are discriminatory in that no special parole provisons are provided under any other federal statute for the commission of any other federal crime. The special parole provisions fail to identify an administering authority or procedure for administration. In failng to pass upon the constitutionality of the special parole provisions, the Court below in *Simpson, supra,* controvened the growing trend towards appellate review of sentencing and sentencing procedures. See, e.g., the new proposed Federal Criminal Code, which provides for appellate review of sentences.

The Petitioner herein submits that parole under the instant statutes is "imprisonment in legal effect." *Anderson v. Corall,* 263 U. S. 193, 44 S. Ct. 43, 68 L. Ed. 247 (1923). *Jones v. Cunningham,* 371 U. S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963). The Petitioner

contends that under the special parole provisions, the possible sentence which may be imposed does not and cannot comport with human dignity since it is nothing more than the pointless infliction of suffering which serves no purpose other than the continued harassment, restriction, and confinement of an individual who has already served his maximum period of incarceration. In the instant case there could be a significantly less severe punishment which would at the same time achieve the purposes for which the punishment was inflicted. The adequate punishment in this case would be the maximum incarceration designated under the statute and the maximum fine, without any period of special parole. Cf. *Robinson v. California,* 370 U. S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962). *Trop v. Dulles,* 356 U. S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1957) (Brennen, J. concurring). In *Weems v. United States, supra,* the Court specifically recognized that the punishment must serve a penal purpose more effectively than a less severe punishment. In this case the special parole provisions serve no purpose other than a continued harassment, restriction, and confinement which deprives a person of his liberty after he has served his maximum period of incarceration.

2. The Fifth Circuit Court of Appeals decided an important question of federal law, which has not been, but which should be, settled by his Court.

The legislative history of the special parole provisions is either silent or equivocal as to the intention of Congress in establishing special parole terms for sentences under the Drug Abuse Prevention and Control Act. As set out in Reason "1." under this question, *supra,* and as argued in his brief on appeal, the Peti-

tioner respectfully submits herein that the unconstitutionality of the special parole provisions of the Drug Abuse Prevention and Control Act, 21, U.S.C. §§ 841 (b) (1) (B) and 960(b) (2), raises a substantial federal question which has not been, but which should be, settled by this Court.

Question Presented

Whether Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq*, is unconstitutional as proscribing intrastate activities.

1. The Fifth Circuit Court of Appeals decided an important question of federal law which should be settled by this Court.

Notwithstanding the decisions in *United States v. Lopez*, 459 F. 2d 949 (5th Cir. 1972), and *United States v. Scales*, 464 F. 2d 371, 375 (6th Cir. 1972), the Petitioner contends that in Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq*, Congress exceeded its permissible exercise of power under the commerce clause and proscribed activities which are purely intrastate. Applying the rational basis standard employed by this Court in interpreting the commerce clause, Congress is empowered "to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those intrastate activities which have a demonstrably substantial effect on interstate commerce." *Perez v. United States*, 402 U. S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971). *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824). *United States v. Sullivan*, 332 U. S. 689, 92 L. Ed. 297, 68 S. Ct. 331 (1948).

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals in the instant case raises substantial questions of general importance in the administration of criminal justice, and it is, therefore, respectfully submitted that this petition for certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner

By:_____
ANTHONY NICHOLAS

September, 1973.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the United States Attorney for the Western District of Texas, by placing same in the United States mail addressed to the Honorable William S. Sessions, United States Attorney, P. O. Box 1701, San Antonio, Texas 78298, this_____ day of September, 1973.

_____
ANTHONY NICHOLAS
Attorney for Petitioner

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 72-2685

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAFAEL R. MARTINEZ, JR.
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(July 3, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: On this appeal, Rafael R. Martinez seeks the reversal of his two count conviction for (1) conspiring to import approximately 628 pounds of marijuana into the United States, 21 U.S.C. §§ 952(a), 963, and to possess the same with intent to distribute, 21 U.S.C. §§ 841(a)(1), 846, and (2) the substantive offense of possessing marijuana with intent to distribute, 21 U.S.C. § 841(a)(1). He attacks

his conviction on the following grounds; (1) the search and seizure which yielded the marijuana introduced into evidence violated the fourth amendment; (2) the declaration of two alleged co-conspirators were inadmissible under the co-conspirators exception to the hearsay rule; (3) the evidence was insufficient to support his conviction; (4) the special parole provisions under which he was sentenced, 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2) violate the due process and the cruel and unusual punishment clauses of the constitution; and (5) Title II of the Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, is an unconstitutional regulation of intrastate activity. We have carefully reviewed each of these contentions and for the reasons which follow affirm the conviction.

We begin with a discussion of the search and seizure contention. On January 26, 1973 government agents received a tip that an orange colored 1969 International flatbed truck would enter the United States from Mexico at Laredo, Texas and would be carrying approximately 600 pounds of marijuana in a secret compartment. Two days later, the truck crossed the border exactly as predicted. It was not inspected at that time, but a check of its license plates with the computer monitoring system indicated that it should be placed under surveillance immediately. The truck was discovered some thirty-five minutes later at a Laredo cafe located about four miles from the border. It was kept under constant surveillance for the next six days, a period during which it traveled more than three hundred miles from place to place in south Texas until it was stopped by customs agents in San Antonio. The details of this meandering journey need not detain us.

The agents searched the truck without a warrant and found 628 pounds of marijuana in one pound packages wedged into a secret compartment beneath the bed of the truck. Between one and two hours were required to unload the marijuana.

The appellant recognizes that probable cause is not a constitutional requirement for a valid border search and further that the concept of the border is an elastic one which is not susceptible of precise definition. Nonetheless, placing particular emphasis upon the distance from the border at the time of the search (150 miles), the total mileage traveled by the truck (more than 300) and the time elapsed after the border crossing (142 hours), he contends that the search in this case was unconstitutional. He asserts that it took place after the truck's entry into the United States was complete and therefore after the full fourth amendment protections became applicable.[1] He further claims that even if the border search rationale is held applicable, the search still cannot be sustained because of the thirty-five minute break in the surveillance immediately following the border crossing. Alluding to the change of condition doctrine,[2] he apparently suggests that there can be no reasonable certainty that the truck was in fact carrying marijuana when it entered this country.

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[1]The appellant derives this conclusion from Carroll v. United States, 267 U.S. 132, 154, 69 L.Ed. 543, 552 (1925). See also United States v. Warner, 441 F.2d 821, 833 (5th Cir. 1971); Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967); Marsh v. United States, 344 F.2d 317, 325 (5th Cir. 1965).

[2]Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966); King v. United States, 348 F.2d 814, 816 (9th Cir. 1965);

We find none of these arguments to be persuasive. Only a brief review of the applicable legal and constitutional principles is essential to our discussion. As this court observed very recently in *United States v. Thompson*:[3] "Border searches, absent search warrants or probable cause, have been uniformly upheld by the Courts as long as the customs agents have had a reasonable suspicion of violations of the customs laws." Although proximity to the border and the lapse of time since the crossing are proper factors for consideration,[4] no specific temporal or spatial limitations on the authority to conduct a border search have been imposed either by statute[5] or by judicial decisions.[6]

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[3] _____F.2d _____(5th Cir. 1973) [No. 72-2600, March 29, 1973]. See also United States v. McDaniel, 463 F.2d 129, 133 (5th Cir. 1972); United States v. Valdez, 456 F.2d 1140, 1142 (5th Cir. 1972).

[4] United States v. McDaniel, 463 F.2d 129, 132-33 (5th Cir. 1972). United States v. Warner, 441 F.2d 821, 832-33 (5th Cir. 1971).

[5] The statutory basis for border searches by customs agents appears in 19 U.S.C. §§ 482, 1581. Neither section contains any reference to distance limitations on this authority. The search in the instant case is a customs search since the investigating officers had reasonable cause to suspect that there was a violation of the customs laws. A customs search, however, is to be compared with an immigration search, authorization for which can be found in 8 U.S.C. § 1357 and 8 C.F.R. § 287.1. It will be noted that a specific geographic limitation has been placed upon immigration searches. As provided in 8 C.F.R. § 287.1, all searches for the purpose of discovering illegally entered aliens must be conducted within 100 air miles from an external boundary of the United States. See United States v. Thompson, _____ F.2d _____ (5th Cir. 1973) [No. 72-2690, March 29, 1973]; United States v. McDaniel, 463 F.2d 129, 132 (5th Cir. 1972).

[6] See notes 3 and 4 *supra*.

Thus, to reiterate, the appropriate constitutional test is a reasonableness standard[7] which requires a full evaluation of the circumstances leading to the search as a basis for determining its propriety.

Examining the facts of this case in light of the preceding principles, we are compelled to hold that the search in this case fell within permissible constitutional limits. An event of twofold significance occurred when the truck crossed the border at Laredo, Texas on January 28, 1972. The first independent corroboration of the informant's tip was provided and for all practical and constitutional purposes a nexus with the border was established which continued thereafter. These facts were entirely sufficient to arouse a reasonable suspicion that the customs laws were being violated. We have no doubt that a warrantless search of the truck could have been conducted at that point under the traditional border search doctrine.

Admittedly the search now under constitutional attack was far removed from that context. It took place approximately 150 miles from the border and 142 hours later in time. It is also of some importance to recall that there was a brief 35 minute hiatus just after the border crossing in Laredo during which no surveillance was in effect. The question which we must decide is whether the intervention of these factors operated to

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[7]This standard in the border search context is less rigorous than the probable cause requirement which normally obtains under the fourth amendment. Garcia v. United States, 452 F.2d 419, 421 (5th Cir. 1971); United States v. Warner, 441 F.2d 821, 832 (5th Cir. 1971).

make the traditional border search rationale inapplicable to the search here involved. We think not.

As indicated earlier the courts have long recognized that the border is an elastic concept, not susceptible to precise definition in temporal or spatial terms.[8] The wisdom of this salutary legal principle is cogently illustrated by the circumstances of this case. In order to enforce the customs laws, particularly those dealing with the illegal importation of drugs, law enforcement officials must do more than arrest the street level operative; they must, if at all possible, apprehend the ringleaders as well. This objective would not be easily attainable if the authority of customs agents to search was strictly limited to the physical border. By following the truck inland the customs agents obviously hoped to apprehend others involved in the smuggling of a large quantity of marijuana. In view of their purpose we think they used a legitimate law enforcement technique which did not undermine their authority. Moreover, at no time was the crucial nexus with the border broken, nor was there any reason for the agents to doubt their original suspicions. Except for the 35 minute hiatus which we find too brief to have been of any consequence,[9] the truck was kept under con-

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[8]See cases cited notes 3 and 4 *supra*. See also United States v. Glazious, 402 F.2d 8, 12 (2d Cir. 1968); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965).

[9]The record discloses that it took customs agents between one and two hours to unload the entire 628 pound shipment of marijuana. It is highly improbable that the marijuana could have been placed in the truck's secret compartment after it crossed the border and before surveillance was commenced.

stant surveillance. It is significant that during the course of this surveillance the agents' suspicions about the truck's illicit cargo were further heightened when the smell of marijuana was detected emanating from the compartment hidden beneath the floor.[10]

The application of the border search rationale to the search in this case does not offend the fourth amendment. To conclude otherwise would place this court in the untenable position of formulating a per se rule that warrantless searches 150 miles inland and 142 hours after entry into this country cannot be sustained as border searches. The appealing simplicity of such an approach must be resisted. It emphasizes the factors of time and distance to the exclusion of all other factors and thus represents a poor substitute for the reasonableness standard. We hold that the customs agents here had reasonable suspicion to believe that the customs laws were being violated and that the search of the truck was constitutionally permissible under the border search exception to the fourth amendment warrant requirement.[11]

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[10]Although we do not base our holding that the instant search was valid on the automobile search theory, Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543 (1925); Chambers v. Maroney, 399 U.S. 42, L.Ed.2d 419 (1970), several factors in this case suggest the soundness of such an approach: (1) the tip of a reliable informant that the truck contained marijuana; (2) the odor of marijuana coming from the secret compartment; (3) the presence of the truck on the open highway and the concomitant possibility that the contraband would be lost or destroyed. We have little doubt that a finding of probable cause to search the truck could be sustained on the record now before us.

[11]Customs searches have been upheld under the border search rationale even though conducted a considerable distance from

The appellant next contends that certain portions of the testimony of two alleged co-conspirators, Hermelindo Garcia and Benito Solis, were improperly admitted into evidence against him under the co-conspirators exception to the hearsay rule. To fully understand and assess this contention it is necessary to summarize the facts alleged to constitute the conspiracy.

As stated earlier, the 1969 flatbed truck carrying the marijuana crossed the border on January 28, 1972. After being driven to several different locations in south Texas by at least three different drivers, it finally came to rest on the evening of January 31 in Laredo where it was parked at Cabello Brothers Wrecking Yard. Hermelindo Garcia, part of whose testimony is now being challenged, came into the picture on February 2. While drinking in a bar on the Mexican side of the border, he was approached by a man whom he had never seen or met before and was asked if he would drive a truck from Laredo to San Antonio that same day. He told Garcia that the truck would be carrying marijuana and was probably under surveillance. Pay for the driver was to be about a thousand dollars. Garcia declined the offer, but referring

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the border. *see, e.g.*, United States v. Reagor, 441 F.2d 252 (5th Cir. 1971) (60 miles); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (105 miles); United States v. Harris, 427 F.2d 1368 (9th Cir. 1970) (150 miles; see statement of facts at 400 U.S. 1211, 1212, 27 L.Ed.2d 30, 32); Ramirez v. United States, 263 F.2d 365 (5th Cir. 1959) (75 miles). Cases involving a substantial time lapse are not as common, but this court recently upheld a border search which took place a full week after the defendant entered this country. United States v. Cristancho-Puerto, 475 F.2d 1025 (5th Cir. 1973).

to Benito Solis, indicated that he knew someone else who might be interested. The unidentified man agreed to the counter proposal and gave Garcia $180 to $200 in cash to pay Solis' travel expenses plus a piece of paper with the name Richard Pie and a phone number written on it. It was understood that a man known as El Coreano would arrange for Solis to pick up the truck at Cabello Brothers in Laredo and also would pay him after he completed the assignment.[12]

Pursuant to his conversation, Garcia contacted Solis and told him the details of the job offer, specifically mentioning the marijuana shipment and the likelihood of surveillance by federal agents. He also gave him the money and the paper with Richard Pie's name and phone number on it. Solis' testimony substantially corroborates Garcia's except that Solis denied any knowledge of the nature of the shipment and the illegality of his activities. He explained that he was asked by Garcia to pick up a load of used lumber in San Antonio.

The remainder of the testimony pertinent to the existence of the conspiracy is largely uncontroverted. After their conversation, Garcia and Solis went to Cabello Brothers where Solis picked up the truck. He drove it to Von Ormy, a town not far from San Antonio. Un-

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[12]In the briefs and at oral argument, both parties stated that it was El Coreano whom Garcia met in the bar on February 2, 1972. We think the record is somewhat unclear on this point. At times Garcia's testimony seems to indicate that the man in the bar was not El Coreano, but perhaps his agent or intermediary. Regardless of which account is correct on this minor factual detail, our conclusion would not be affected.

successful in his attempts to contact Richard Pie, he decided to leave the truck parked there and hitched a ride back to Laredo arriving at 3:00 a.m. February 3, 1972.

Solis was aroused from his sleep about four hours later by the appellant Martinez. Though he had seen Martinez the day before in a filling station on the road to San Antonio, Solis had never had any previous contact with him. Martinez asked him to get up and drive the truck in to San Antonio as he had originally agreed to do. Solis indicated that he would cooperate and thereupon rode to Von Ormy in a blue Ford along with Martinez and another man whom he also did not know. At Von Ormy Martinez instructed Solis to drive the truck to a Texaco station on the freeway and to wait there until he arrived. Later, when the blue Ford drove up, Martinez's companion instructed Solis to follow their car. He did so until he lost sight of the Ford in a San Antonio residential area. He was arrested shortly after returning to the freeway at which time the search took place.

The challenged portions of Garcia's and Solis' testimony consist principally of references to El Coreano, Richard Pie and the suggestion of some connection between the two. At the outset, we should lay to rest any thought that the admission of this testimony was of no serious consequence to the appellant's defense in this case. In view of the fact that Martinez was known by the nickname of Richard Pie, the damaging character of this testimony should be obvious. It clearly tended to place him in the conspiratorial web.

It is not disputed that such hearsay testimony can be admitted in a conspiracy trial. The question which we must decide is whether the proper foundation was laid. Though at times difficult to apply, the controlling rule of law is relatively simple to state: any declaration by one co-conspirator made in furtherance of the conspiracy and during its pendency is admissible against each co-conspirator provided that proof of the existence of a conspiracy is established by independent evidence.[13]

In determining whether there is independent evidence of a conspiracy, the trial judge has substantial discretion. He need be satisfied only that the evidence is credible and sufficient to support a finding of a joint undertaking.[14] The prosecution unquestionably does not have to establish conspiracy beyond a reasonable doubt.[15] Upon a finding that a conspiracy exists and that the defendant is a participant herein, the trial court can then admit the hearsay declarations of a fellow conspirator against the defendant.[16]

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[13]Glasser v. United States, 315 U.S. 60, 74-75, 86 L.Ed. 680, 701 (1942); Lutwak v. United States. 344 U.S. 604, 616-617, 97 L.Ed. 593, 602-603 (1953); United States v. Apollo, _____F.2d _____ (5th Cir. 1973) [No. 72-2005], April 3, 1973; United States v. Martinez, 466 F.2d 679, 685 (5th Cir. 1972); United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir. 1972).

[14]United States v. Johnson, 467 F.2d 804, 807 (1st Cir. 1972); United States v. Sanders, 463 F.2d 1086, 1088 (8th Cir. 1972); United States v. Bey, 437 F.2d 188, 190 (3rd Cir. 1971); United States v. Elliot, 437 F.2d 1253, 1255 (5th Cir. 1971).

[15]United States v. Elliott, 437 F.2d 1253, 1255 (5th Cir. 1971).

[16]The trial court has the discretion to admit hearsay statements of alleged co-conspirators subject to later proof of the existance of the conspiracy and the defendant's connection with it.

In our judgment the record before this court is replete with evidence tending to support the existence of a conspiracy. Apart from its hearsay aspects, Garcia's testimony plainly reveals that he knew of the illegal aims of the conspiracy and agreed to advance them by recruiting Solis to drive the truck. Though Solis contradicted Garcia on the question of his personal knowledge of the illegal nature of the activities he was to perform, he corroborated Garcia in other respects and, in fact, provided a service that was essential to the ultimate objective of the conspiracy. Solis further provided direct testimony linking the appellant Martinez to his combination as did the surveilling customs agents. Viewing the actions of the trial judge in this light, we are convinced that he did not commit reversible error by permitting the jury to consider the hearsay aspects of the testimony of Garcia and Solis. Our conclusion in this respect would not be altered even if we were to find as a fact that Martinez joined the conspiracy *after* the hearsay declarations in this case were made.[17]

United States v. Appollo, _____ F.2d _____ (5th Cir. 1973) [No. 72-2005, April 3, 1973]; United States v. King, 467 F.2d 478, 479 (6th Cir. 1972); Nelson v. United States, 415 F.2d 483, 487 (5th Cir. 1969). This was the procedure followed in the instant case. Before Garcia and Solis were allowed to give any testimony, the trial court instructed the jury in great detail about the restrictions under which they would be able to consider the hearsay testimony against the appellant. The trial court displayed an abundance of caution in protecting the appellant's rights.

[17]United States v. United States Gypsum Co., 333 U.S. 364, 393, 92 L.Ed. 746, 765 (1947); United States v. Sarno, 456 F.2d 875, 878 (1st Cir. 1972).

Extensive discussion of the appellant's remaining contentions is not required. In dealing with his hearsay contention, we have reviewed the evidence in some detail. This review, we believe, makes clear that there was sufficient evidence to sustain the appellant's conviction on both counts.[18] Likewise without merit are the appellant's constitutional attacks on the special parole provisions[19] and Title II of the Drug Abuse Prevention Act, 21 U.S.C. § 801 *et seq.*[20] The judgment of conviction against the appellant is AFFIRMED.

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[18]United States v. Glasser, 315 U.S. 60, 80, 86 L.Ed. 680, 704 (1942); United States v. Warner, 441 F.2d 821, 831 (5th Cir. 1971). Once evidence of a conspiracy is shown, only slight additional evidence is required to connect a particular defendant with that conspiracy. United States v. Iacovetti, 466 F.2d 1147, 1154 (5th Cir. 1972); United States v. Morado, 454 F.2d 167, 175 (5th Cir. 1972).

[19]United States v. Simpson, _____ F.2d_____ (5th Cir. 1973) [No. 73-1208, 1973]; United States v. Scales, 464. F.2d 371, 376 (6th Cir. 1972).

[20]United States v. Lopez, 459 F.2d 949 (5th Cir. 972); United States v. Scales, 464 F.2d 371, 375 (6th Cir. 972).

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 72-2685

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAFAEL R. MARTINEZ, JR.
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 3, 1973, 5 Cir., 1973, ____ F.2d ____).

(August 14, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regu-

lar active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 73-1208

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BONNIE LEE SIMPSON,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(June 29, 1973)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: Appellant Simpson was indicted for conspiring to possess with the intent to distribute a quantity of lysergic acid diethylamide (L.S.D.) in violation of 21 U.S.C. §§ 841(a)(1) and 846. A jury found her guilty and a sentence of five years imprisonment was imposed to be followed by a special parole term of ten years. On this appeal, Simpson limits her challenge to the imposition of the

special parole term of ten years. At the time of sentencing when the term of special parole was imposed by the court no objection was made by the appellant to the special parole term.

In an apparent response to the growing drug problem which infests our nation Congress has enacted special rehabilitative and parole provisions which guide a trial court in sentencing a convicted defendant like the appellant.[1] 21 U.S.C. § 841(b)(1)(B) requires the trial

[1]An extended-discussion of the act, the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* is unnecessary here. We have previously upheld the constitutional validity of the act. See, United States v. Lopez, 459 F.2d 949 (5th Cir. 1972) Section 841 (b) (1) (B) reads in relevant part:

> In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both . . . . Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment . . .

Further subsection "c" provides:

> A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Since appellant was a first offender, the trail court appropriately sentenced her under the above provisions.

court after imposing the prison sentence under that subsection on a first offender to further provide a special parole term of at least two years. Thus in the instant case after imposing the maximum sentence of five years, the lower court pursuant to the mandate of the above provision added the special parole term now challenged.[2]

Appellant now makes a broad-based constitutional challenge to this special parole provision enacted by Congress. She asserts that her fifth amendment rights to due process of law have been violated because: (a) the imposition of a special parole term is infirm on vagueness grounds; and (b) Congress has failed to clearly provide an agency to oversee felons sentenced under the special parole provisions or to delineate the conditions of parole. Finally, appellant asserts that the application of the special parole provision by the trial court in imposing a ten year term violates the eight amendment proscription against cruel and unusual punishment. Recognizing our duty to provide for the fundamental fairness guaranteed by the fifth amendment to all who become ensnarled in the criminal process, we nevertheless conclude that the provisions now challenged do not fall beow the applicable standards required by the due process clause of the fifth amendment and therefore affirm.

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[2]Although 21 U.S.C. § 841 (b) (1) (B) requires a minimum parole term of two years, the maximum limits for the special parole term are left to the discretion of the trial court. Thus, Congress implicitly recognized the equitable and remedial considerations which go into such sentencing processes and accordingly deferred to the expertise of the sentencing tribunal who must deal with such problems on a case by case basis.

At the outset it must be noted that the sentence imposed by the district court is succinctly stated. Appellant must spend five years in prison followed by a special parole term of ten years for her misdeeds. At least in this respect then the sentence is unequivocal and its exactitude cannot be questioned. However, the real thrust of appellant's vagueness argument is that she does not know what will be the conditions of her parole or what agency will supervise her conduct when she is eventually granted conditional freedom.

Such issues are not ripe for adjudication at this time. Appellant has been sentenced to serve five years in prison and will not commence to serve her ten year parole term until the termination of this period. Further, we are aware of no constitutional requirement that a convicted felon is entitled to prior notice of the conditions of his sentence or term of parole. Such lack of knowledge applies to the conditions of her confinement as well as the conditions of her parole. While certain conditions of parole are undoubtedly imposed on all released persons, the prescription of other restrictions must await a detailed examination of the prisoner and the unique circumstances surrounding each particular case before they can be intelligently imposed. Thus whatever conditions are eventually imposed, the reasons for their imposition are well grounded in the dual needs of protecting society and rehabilitating the felon. Common sense tells us therefore that appellant is not now prejudiced or harmed by the seeming failure of the Act to provide specifically for the administration of her parole term or its conditions.

It is beyond constitutional doubt that Congress has the inherent power to adopt penal and rehabilitative provisions in response to the present pervasive drug traffic problem. This is particularly true when the quantity of the drug and its dangerous ingredients affect not only the individual user but society as well. While in this instance Congress could have been more specific by enacting detailed directives on how this special parole term is to relate to the traditional parole process, we fail to perceive how a lack of such directives is an impediment to the constitutionality of the Act.

Although we do not reach the problem of whether an individual sentenced under the Act will be subject to the control of the United States Board of Parole or under the direct supervision of the sentencing court, it is our tentative opinion that such supervision could be provided by the parole board.[3] If it should be concluded that the parole board does not have authority to supervise persons placed on parole pursuant to the Act, it would appear that the sentencing court would have the inherent power to supervise parolees under the recognized role of the judiciary in supervising the execution and implementation of its judgments and sentences.

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[3]It should be noted that the statute which creates the Board of Parole provides that it is under the supervision of the Department of Justice. The Act specifically provides:

> The Attorney General shall from time to time designate one of its members to serve as Chairman of said Board and *delegate to him the necessary administrative duties and responsibilities.* (emphasis suplied) 18 U.S.C. § 4201.

By its terms the Parole Board Act apparently applies to all federal prisoners.

Courts have wide discretion under many criminal statutes with respect to the imposition of sentences. For example in criminal contempt cases, a federal court has unlimited discretion as to the length of the sentence to be imposed. 18 U.S.C. § 401. Similarly a federal court now exercises plenary control over those whose sentences have been probated. See 18 U.S.C. § 3651. In a somewhat analogous situation Congress has vested in the sentencing court great flexibility in dealing with juvenile offenders under the Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq.* See particularly section 5010 of that act. Attacks against the Federal Youth Corrections Act similar to the ones asserted here by appellant have been uniformly rejected by the courts. There is some uncertainty inherent in every sentence imposed. Actually each defendant is committed "to the custody of the Attorney General or his authorized representative for imprisonment." The sentence makes no reference to the place or the specific conditions of confinement. Indeterminate sentences in state courts are not uncommon.[4] Against this background, appellant's contentions must fail. It is should develop that her supervision and treatment during her parole violate fundamental principles of fairness, surely such treatment would be subject to an attack in an appropriate suit in federal court. At the present time however, such an attack is premature and is based on pure surmise and conjucture.

Likewise, appellant's eighth amendment attack is without merit. Appellant was convicted of a conspiracy

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[4]See, D. Karlen, Angelo-American Criminal Justice 201-202 (1967).

to possess with the intent to distribute 4.8 grams of L.S.D. Without contradiction government counsel points out that the evidence in this case shows that this is enough L.S.D. to market 48,000 unit dosages. We feel that the sentence imposed by the lower court is totally consistent with the "precept of justice that the punishment for crime should be graduated and proportioned to [the] offense."[5]

AFFIRMED.

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[5]Weems v. United States, 217 U.S. 349, 367 (1910). [54 L.Ed. 793]. See, United States v. Scales, 464 F.2d 371, 376 (6th Cir 1972).

SUPREME COURT, U. S.
FILE
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No. 73-529

In the Supreme Court of the United States

OCTOBER TERM, 1973

RAFAEL R. MARTINEZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the validity of a search and seizure and the constitutionality of various provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on two counts of possession of marihuana with intent to distribute and conspiracy to import and possess marihuana, in violation of 21 U.S.C. 841, 846, 952, and 963. He was sentenced to concurrent terms of five years' imprisonment, to be followed by ten years' special parole. The courts of appeals affirmed (Pet. App.).

In January 1972, customs agents were advised by a reliable informant that an orange flatbed truck would arrive in San Antonio, Texas, on January 28, carrying

600-650 pounds of marihuana (Tr. 56, 144-145, 149).[1] On that afternoon, the truck crossed the border at Laredo, Texas. Continuous surveillance of the truck began approximately one-half hour later at a cafe in Laredo (Tr. 57-59). The surveillance continued for several days as the truck was driven to various locations in southern Texas, with occasional changes of drivers (Tr. 60-67). On January 31, 1972, while the truck was unoccupied, customs agents examined its underside and detected an odor which they recognized as marihuana (Tr. 67-68). They did not make an immediate search, however, because they hoped to apprehend the unknown persons to whom the marihuana was to be delivered (Tr. 79).

On February 3, 1972, the truck was joined near San Antonio by a Ford automobile carrying two persons, one of whom was a previous driver of the truck. The car drove off, and the truck proceeded toward San Antonio. The Ford reappeared with two other persons, and both vehicles, under surveillance, began following a circuitous route through a residential district of San Antonio. After some time, the automobile again drove away, and the truck proceeded south. At that point, believing that the surveillance had been discovered, the customs agents halted the truck (Tr. 112, 176-178). A search revealed a secret metal compartment on the underside of the truck, extending the length of the frame and containing numerous packages of marihuana wrapped in brown paper. More than an hour was required to unload the several hundred one-pound packages in the compartment (Tr. 179, 209-210).

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[1] "Tr." refers to the transcript of the pre-trial hearings, a copy of which is being lodged with the Clerk of this Court.

The driver of the truck identified petitioner as a participant in a plan to import and distribute the marihuana. It was also learned that petitioner had been one of the persons present in the Ford automobile on February 3, 1972. Petitioner was subsequently arrested, pursuant to a warrant (Tr. 180, 186, 189-190, 203).

1. Petitioner contends that the warrantless search of the truck violated the Fourth Amendment. The court of appeals disposed of this claim by sustaining the inspection as a border-area customs search (Pet. App.). It is unnecessary, however, to consider whether that conclusion is correct, since, as the court below also recognized (Pet. App. 29, n. 10), the search was properly made upon probable cause under exigent circumstances.[2]

At the time the surveillance began, customs agents had no evidence other than a reliable informant's tip that the described truck would be traveling to San Antonio with a load of marihuana. As the surveillance indicated, however, the truck did not proceed immediately to San Antonio, but was driven to three other cities in southern Texas over a period of six days. After three days of surveillance, the agents approached the truck and detected the odor of marihuana. They then had probable cause to believe that the truck carried contraband, for the facts and circumstances within their knowledge corroborated the earlier tip. *Chambers* v. *Maroney*, 399 U.S. 42, 46; *Draper* v. *United States*, 358 U.S. 307, 313; *Carroll* v. *United States*, 267 U.S. 132, 162.

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[2] We also submit that petitioner is without standing to complain of the search, even though he was charged with a possessory offense, since his actual possession was not contemporaneous with the search. In this respect, the continuing vitality of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257, was left in serious doubt by *Brown* v. *United States*, 411 U.S. 223, 229.

The officers did not search the vehicle as soon as probable cause appeared because they sought to apprehend the consignees of the marihuana shipment, not merely the driver of the truck. This was a wholly legitimate aim, which violated no right of petitioner. The officers were not obliged to cease their investigation as soon as they possessed the minimum evidence required to support a search or arrest. See *Hoffa* v. *United States,* 385 U.S. 293, 310.

The officers halted their investigation, however, when it became evident that their surveillance had been detected and the truck began to drive south, in the direction of the border. At that point, it was no longer possible to await delivery of the marihuana before making an arrest; an immediate search was required to prevent the evidence from being lost or destroyed. Since there was then insufficient time to obtain a warrant, it was proper for the agents to halt the truck and search it immediately. *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52; *Carroll* v. *United States, supra,* 267 U.S. at 153; see also *Cady* v. *Dombrowski,* 413 U.S. 433.[3].

2. Petitioner challenges the constitutionality of the special parole provisions contained in 21 U.S.C. 841(b)(1)(B) and 21 U.S.C. 960(b)(2) on the ground that these provisions do not specify a maximum parole term. Each of these statutes mandates a minimum two-year special parole term, in addition to the prison sentences provided for the crimes of which petitioner was convicted; the statutes do not set a maximum special parole term. Petitioner was sentenced to ten years of special parole

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[3] *Almeida-Sanchez* v. *United States,* 413 U.S. 266, does not apply here, since there was in that case concededly no probable cause to stop or search the vehicle.

to follow his concurrent five-year sentences. He contends (Pet. 20) that the proper punishment for his offenses may not exceed the maximum prison sentences and fines permitted by law. Even assuming that this issue is presently "ripe" for resolution (but see *United States* v. *Simpson,* 481 F. 2d 582 (C.A. 5), certiorari denied, December 10, 1973, No. 73-5434), there is no merit to this claim.

Petitioner's analysis overlooks the intent of Congress in revising the mandatory sentence provisions which existed under prior federal law. While legislative history regarding the special parole term is sparse, it is apparent from the congressional debates that the new sentencing provisions were not intended solely to liberalize the lengthy terms and mandatory sentences of the old law, but were also designed to afford judges more flexibility in sentencing and allow them to distinguish minor offenses from more serious ones.

The new penalties contemplated an initial incarceration, with a fixed maximum, with sufficient flexibility for the sentencing judge to fashion more lenient or more severe punishment as the occasion warranted, including the use of supervised parole. The purpose was to restore to the judge the traditional discretion which had been limited by the prior law. See 115 Cong. Rec. 39253 (remarks of Senator Dodd); 116 Cong Rec. 1182 (remarks of Senator Thurmond); 116 Cong. Rec. 1665 (remarks of Senator Hruska); see also Hearings on Narcotic Legislation Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, pursuant to S. Res. 48, 91st Cong., 1st Sess., pp. 278, 676. Thus, Congress probably would not have set so light a penalty for felony drug offenses as a maximum five-year prison term, had it not provided

that the defendant could be subject to further supervision under the special parole provisions. See *United States* v. *Simpson, supra,* 481 F. 2d at 584-585.

Nor does petitioner's punishment violate the Eighth Amendment. If petitioner had been sentenced to consecutive terms for the two offenses of which he was convicted, he could have received a sentence of ten years in prison, plus a minimum of four years of special parole—a sentence nearly as long as and much more restrictive than that which he actually received. A lengthy special parole term in the instant case was clearly appropriate for petitioner, who was not a casual violator of the law, but a participant in a large-scale scheme to import large quantities of illicit drugs for distribution in the United States. See *United States* v. *Simpson, supra,* 481 F. 2d at 585; *United States* v. *Scales,* 464 F. 2d 371 (C.A. 6).

3. Petitioner contends that Title II of the Comprehensive Drug Abuse Prevention and Control Act is unconstitutional because it proscribes intrastate, as well as interstate activities. Since petitioner's offense involved the importation of marihuana from Mexico—a transaction clearly within the power of Congress to regulate—he cannot be heard to complain of the statute's application to him. *United States* v. *Thaggard,* 477 F. 2d 626, 630 (C.A. 5), certiorari denied, December 3, 1973, No. 73-242; *United States* v. *Harris,* 460 F. 2d 1041, 1048 (C.A. 5), certiorari denied, 409 U.S. 877.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

DOJ-1974-01